87-1870

Supreme Court, U.S.
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NO._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

MORETON ROLLESTON, JR.,

Petitioner,

Vs.

ROSE HALL (DEVELOPMENTS) LIMITED,
JOHN ROLLINS, MRS. MICHELLE ROLLINS,
ROSE HALL LIMITED and
ROLLINS JAMAICA LIMITED,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Moreton Rolleston, Jr.
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Petitioner, Pro Se

7812P

QUESTIONS PRESENTED FOR REVIEW

1. Can the Federal Courts apply the statute of limitations of Delaware in a case involving building construction in Jamaica when the construction contract between residents of Delaware and residents of other states specifically says: "This agreement shall be read and construed and be deemed to be subject to the laws of Jamaica which shall be the proper law of the contract"?

2. Can a Defendant, who has filed pre-pleading motions and no answer, file three months later another motion to dismiss based on a statute of limitations, in violation of F.R.C.P. 12(g) which requires all available defenses to be included in one pre-pleading motion?

3. In the case of Rose Hall Limited vs. Chase Manhattan Overseas Banking Corp., et al, 494 F.Supp. 1139 (1980), the Court held, in part, as follows:

"The interest of Rose Hall in bringing the action in Delaware is beyond question. The indirect but ultimate beneficiary of the action, if successful, is John Rollins, a resident of Delaware. He owns all of the stock of Rollins Jamaica Ltd., a Delaware corporation, which in turn owns all of the stock of Rose Hall a Cayman Island corporation".

Did not the Appellant (Plaintiff below) present sufficient evidence to pierce the corporate veil and establish this same John Rollins as the alter ego of the same corporation involved in the Chase case? Did not the evidence bring the instant case within the scope of the ruling in the Valley Finance, Inc., et al vs. United States of America et al?

STATUTES AND AUTHORITIES

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1.	Federal Rules of Civil Procedure, 12(g)	5,7,23
2.	Rose Hall Limited vs. Chase Manhattan Overseas Banking Corp, et al, 494 F. Supp 1139 (1980)	20
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4.	F. Irvin Dymond vs. National Broadcasting Company, Inc. a subsidiary of Radio Corporation of America, and George Schlatter, d/b/a Schlatter Productions, 559 Fed. Supp. 734	22
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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Petitioner, Moreton Rolleston, Jr. respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals

for the Third Circuit entered in this case on February 26, 1986.

OPINION BELOW

The Opinion of the United States Court of Appeals for the Third Circuit has not been reported. The opinion, dated February 26, 1986, is set forth in full in the Appendix.

This case was appealed to the Third Circuit from the rulings of United States District Court for the District of Delaware that granted some of the Motions to Dismiss of Defendants. The District Court held that:

(1) Counts 1, 2, 3 and 4 of the Complaint were dismissed because they were barred by the Delaware statute of limitations of three years.

(2) A pre-pleading motion setting

up the defense of statute of limitations, which was filed three months after the first pre-pleading motion of the Defendants was allowed as an amendment to the first motion.

(3) The complaint did not allege sufficient facts to pierce the corporate veil and to establish John Rollins as the alter ego of any of the three corporations, Rose Hall Limited, Rose Hall (Developments) Ltd. or Rollins Jamaica Limited.

JURISDICTION

The opinion of the District Court was issued and entered on June 24, 1985 and an amendment thereto was issued October 17, 1985

and entered October 18, 1985. The jurisdiction of this Court is evoked under 28 U.S.C. §1254.

STATUTES INVOLVED

1.

10 Del. C §8106. Actions subject to three-year limitation. No action to recover damages for trespass, no action to regain possession of personal chattels, no action to recover damages for the detention of personal chattels, no action to recover a debt not evidenced by a record or by an instrument under seal, no action based on a detailed statement of the mutual demands in the nature of debit and credit between parties arising out of contractural or fiduciary relations, no action based on a promise, no action based on a statute, and no action to recover damages caused by an injury unaccompanied with force or resulting indirectly from the act of the defendant shall be brought after the expiration of 3 years from the

accruing of the cause of such action; subject, however, to the provisions of sections 8107-8109 and 8118 of this title.

2.

F.R.C.P. 12(g). Consolidation of Defenses In Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

STATEMENT OF CASE

Summary Statement of Case as to Question No. 1 Presented for Review. The 1973 contract between Rolleston and the Developer provided that a restaurant would be built in the condominiums. It has never been built. Rolleston filed suit in Delaware for damages. The trial court dismissed the Complaint on the principal ground, among others, that the complaint was barred by Delaware's three year statute of limitations. There is no statute of limitations in Jamaica. The contract provided that it would be construed according to the laws of Jamaica.

Summary Statement of Case as to Question No. 2 Presented for Review. Original complaint was filed January 30, 1984. Rollins and Mrs. Rollins filed a pre-pleading motion to dismiss on February 21, 1984. On May 23, 1984, almost four months later, Rollins, Mrs. Rollins, the developer

and Rose Hall filed another pre-pleading motion and raised the defense of Delaware's three year statute of limitations. Under F.R.C.P. 12 (g) Rollins, et al had to raise the defense of statute of limitations in the first pre-pleading motion. The lower court disregarded this Rule and allowed the amendment.

Summary Statement of Case as to Question No. 3 Presented for Review. John Rollins owns all the stock in Rollins Jamaica Limited, who owns all the stock in Rose Hall Limited who owns all the stock in Rose Hall (Developments) Limited (the Developer). John Rollins is Chairman of the Board of Rollins Jamaica and Mrs. Rollins is President. John Rollins transferred corporate stock in Rollins Leasing to Rollins Jamaica who in turn sold it and from time to time made loans to Rose Hall and Developer. Rollins and Mrs. Rollins, their Jamaican lawyer and two employees are the Directors of all the corporations. Rose Hall and the

Developer have no officers but are operated through a Board of Directors, according to their charters. All loans and finances were under the sole direction of John Rollins. The Developer owes Rose Hall $4,144,043.00. John Rollins used corporate property and airplanes to further his personal and political objectives. No significant action was ever taken by any of these corporations or directors without the prior approval of John Rollins. The complaint alleges that he was the alter ego of Rollins Jamaica (a Delaware corporation) and Rose Hall (Dev.) Ltd. (the Developer) (a Jamaican corporation). Rollins and Mrs. Rollins are residents of Delaware.

A more detailed Statement of the Cases and Facts follows.

STATEMENT OF CASE

On January 30, 1984 Appellant (hereinafter "Rolleston") filed a Complaint in Five Counts for declaratory judgment, temporary and permanent injunction and damages against Rose Hall (Developments) Limited (hereinafter "Developer") John Rollins, Mrs. Michelle Rollins and Rose Hall Limited (hereinafter "Rose Hall").

Count One seeks a declaratory judgment for a breach of a written contract, the principal breach being the failure to construct a restaurant building on the premises of a condominium project known as The Palms at Rose Hall, Montego Bay, Jamaica (hereinafter "The Palms"). The damages, as alleged, are measured by the value of the restaurant building at $250,000 and the amount of the loss of rents occasioned by the failure to build the restaurant.

Count Two of the complaint seeks a court order compelling Rose Hall to convey approximately 16.7 acres of land to Developer, upon which the amenities of The Palms are located.

Count Three of the complaint seeks to enjoin Developer from proceeding with a suit in Jamaica brought by Developer and The Properietors, Strata Plan No. 50, a Jamaican corporation (hereinafter "The Proprietors"). This count does not seek to enjoin The Proprietors from proceeding with that suit.

Count Four of the complaint seeks to recover over $15,000 in unpaid assessments levied by The Proprietors and alleges that these assessments are the obligations of Developer and Rollins who purchased the condominium units upon which the assessments had not been paid.

Count Five of the complaint alleges that

128 oleander plants, three sabel palm trees, a twenty foot shcefflera and other plants, of the total value in excess of $17,800.00, were removed from The Palms and seeks to recover money damages in that amount. Some of the plants were removed from land to which Appellant has an undivided interest. Some of the plants were removed from the land upon which Developer had agreed in writing to place the various plants as part of the landscape plan and to maintain such. This Count also alleged that Developer is the alter ego of Rollins and Mrs. Rollins and seeks punitive damages.

On May 23, 1984, the complant was amended. This amendment seeks a declaratory judgment that Rollins Jamaica Ltd. (hereinafter "Rollins Jamaica"), Rose Hall Limited (hereinafter "Rose Hall") and Rose Hall (Developments) Limited (hereinafter "Developer") are the alter ego of Rollins and Mrs. Rollins and asked judgment for damages in the same amounts as prayed in Counts I through V of the complaint.

None of the Appellees filed any answer until October 15, 1985. On February 21, 1984 Rollins and Mrs. Rollins filed a pre-pleading Motion to Dismiss "pursuant to F.R.C.P. 12(b)(3)" (improper venue), F.R.C.P. 12(b)(7) (failure to join a party) and on the ground of forum non conveniens.

On March 2, 1984 Rolleston filed a response to said motion to dismiss.

On May 23, 1984 Developer, Rose Hall, Rollins and Mrs. Rollins filed a Motion to Defer Certain Issues and to Supplement Their Motion to Dismiss by which in paragraph 3. those named Appellees sought for the first time to raise the issue that Counts I, II and IV of the Complaint are barred by Delaware's three year statute of limitations. Note that Counts III and V are not mentioned in the Motion. Rollins Jamaica was not a party to the suit at the time the said motion to

dismiss, based on the statute of limitations, was filed.

After the amendment to the original complaint was filed on May 23, 1984 naming Rollins Jamaica as a Defendant, Rollins Jamaica filed on June 4, 1984 a Motion to Dismiss on the grounds that the Complaint is barred by Delaware's three year statute of limitations.

In 1973 the Developer began construction of a condominium project in Montego Bay, Jamaica, known as The Palms at Rose Hall, consisting of 18 condominium units with an Administration building and amenities, including a swimming pool, two tennis courts, landscaped grounds and a private beach on the Carribean Sea. In 1973 Rolleston purchased five of the eighteen condo units. Under Jamaican law, each condominium project is incorporated and this one was known as "The Proprietors, Strata Plan No. 50". The contractor,

employed by the Developer, completed the buildings but did not finish all of the other work provided in the plans and specifications, such as walls, walkways, pavings, landscaping and the restaurant. This unfinished work was finished by Rolleston by applying his purchase price payments, with agreement from the Developer, towards paying other contractors of various trades to finish most of the work called for in the plans and specifications. The restaurant over the ocean has never been built. Several completion dates were announced by the Developer and several demands have been made by Rolleston and other Owners that the Developer build the restaurant.

The eighteen condominium units in three buildings were built on an area of less than one-fourth acre (11,315.9 feet). This quarter of an acre was conveyed by Rose Hall to the Developer. All the surrounding property of approximately 16 acres is still owned by Rose Hall. All of the

amenities are built on land still owned by Rose Hall. The Developer agreed to furnish these amenities to the Owners of the condominium units. Although the amenities have been made available to the Owners, in order to establish their legal right to these amenities, the land upon which the amenities are located must be conveyed from Rose Hall to the Developer.

The Palms at Rose Hall was advertised as a 198 unit condominium to be operated as a hotel. None of the other units have ever been started. After the 18 units had been built, and during the time when Rolleston completed the items set forth hereinabove, Developer for all practical purposes abandoned the project and turned it over to "The Proprietors, Strata Plan No. 50" for operation, evidenced by a written agreement.

Developer sold all of the units except one, but later reacquired all of the units, which were subject to foreclosure, except those owned by Moreton Rolleston, Jr. Don Renshaw, Harold Williams and David Germund. When Developer re-acquired the units they also became responsible for the past due assessments, in accordance with Jamaican condominium law.

When the Developer reasserted its management control, it attempted to levy assessments on the Owners in an excessive amount in order to take care of not only the common elements, but the amenities and surrounding property. Rolleston resisted such assessments and Developer sued Rolleston in the Jamaican courts. That case is still pending. Rollins and Mrs. removed 128 oleander plants, plam trees and other vegetation from The Palms for which Count V is a suit for damages.

John Rollins lives on Owls Nest Road in Greenville, Delaware. Mrs. Rollins has lived in Greenville, Delaware for about seven and one-half years since she and John Rollins were married. Greenville, Delaware is located 3 miles from Wilmington, Delaware. Both Rollins and Mrs. Rollins are residents of Delaware and are subject to the jurisdiction of this Court.

Appellee Rollins Jamaica Limited ("Rollins Jamaica") was incorporated in the State of Delaware on February 8, 1965. The principal office of Rollins Jamaica is know as No. One Rollins Plaza, 2200 Concord Pike, Wilmington, Delaware. Plaintiff's Exhibits 3 and 4 to Weaver's deposition are letters written on stationery of Rollins Jamaica Limited, 2200 Concord Pike, Wilmington, Delaware 19899. Rollins Jamaica, is subject to the jurisdiction of this Court because it was incorporated in Delaware and maintains its principal business

office in Delaware.

There are no officers of Rose Hall or Developer. The business of each of these companies is managed by directors in accordance with the Articles of Association of each. Weaver testified that there were no officers of either Rose Hall or Developer. Weaver also testified that the present directors of Rollins Jamaica, Rose Hall and Developer were identical in that John Rollins, Mrs. Rollins and Weaver are Directors of each of the three corporations. Since 1974 Rollins and Weaver have been Directors of Rollins Jamaica. Mrs. Rollins replaced John W. Rollins, Jr. and became President of Rollins Jamaica. John Rollins is Chairman of the Board of Rollins Jamaica.

Rollins, Mrs. Rollins and Weaver are present directors of Rose Hall; the only other two are Hart and Weitzel.

Rollins, Mrs. Rollins and Weaver are the Directors of Developer; again Hart and Weitzel are listed as Directors. Hart is a lawyer in Jamaica and Weitzel is the former Vice President and General Manager of Rollins Jamaica.

John Rollins owns all the stock in Rollins Jamaica. Rollins Jamaica owns all the stock in Rose Hall. Rose Hall owns all the stock in Developer. Rose Hall owned all the stock in Rose Hall (H.I.) Ltd. which owned the 500 room Holiday Inn that Rollins built in Montego Bay. Rose Hall also owned all the stock in Rose Hall Intercontinental Hotel Ltd. which owned 74% of the stock in the company which owned the 500 unit Intercontinental Hotel which Rollins built in Montego Bay. The balance of the stock was owned by a subsidiary, Pan American Airways. Rose Hall owned approximately 3,000 acres of land a balance of which was used in the construction of the

Holiday Inn and the Hotel Intercontinental and was the subject of the lawsuit between Rose Hall and Chase, U.S. District Court, District of Delaware, Civil Action No. 79-182. The Rose Hall Great House which was formerly owned by Rose Hall was transferred to the Urban Development Corporation, a Jamaican government corporation but is currently operated by Developer under a lease. Delgado is the Resident Manager of the Rose Hall Great House and Mrs. Delgado is in charge of The Palms. Mr. and Mrs. Delgado live at The Palms.

The obvious point is that John Rollins is the sole stockholder of Rollins Jamaica which owns all the stock of all the other companies either directly or through subsidiaries. John Rollins is Chairman of the Board of Rollins Jamaica. Mrs. Rollins is President of Rollins Jamaica. Weaver is the Financial Vice President of Rollins Jamaica. Rollins, Mrs. Rollins and

Weaver are the sole Directors of Rollins Jamaica and three of the five Directors of Rose Hall and three of five Directors of Developer. Their lawyer in Jamaica, Hart, is one of the two Directors of both companies as is Weitzel who used to be active in Rose Hall as the General Manager. Weitzel now lives in Titusville, Florida. Therefore we contend that John Rollins is in absolute financial and legal control of Rollins Jamaica, Rose Hall and Developer and has always exercised that control.

The issues presented by this petition were first raised in the original complaint filed in the U.S. District Court for the District of Delaware.

On June 24, 1985 the lower court issued a Memorandum Opinion and Order of District Court by which the court granted the Motion to Dismiss of Developer, Rose Hall, Rollins Jamaica as to

all counts of the Complaint and granted the Motion to Dismiss of Rollins and Mrs. Rollins as to Counts I, II, III and IV and denied the Motion to Dismiss as to Count V of the Complaint.

REASONS WHY CERTIORARI SHOULD BE GRANTED

This case qualifies for and merits the attention of this Court for three reasons:

(1) This case involves laws of a foreign country. The first question that must be answered is whether or not the courts of the United States will give credance to the laws of a foreign country when the contract in question specifically states that it is to be governed by the laws of the foreign country. We rely on the Dymond case (page (iii),supra).

(2) This Court should resolve the conflict among the circuits and states as what is necessary "to pierce the corporate veil". The Valley case, which comes from the District of Columbia Circuit, cites cases concerning this theory of law from the Fourth, Seventh and Tenth Circuits. Other cases which have considered the corporate veil and have added a different twist each time are listed in Appendix E.

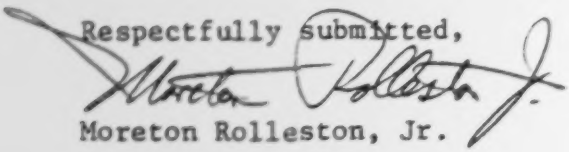
(3) This case presents a troublesome question in the administration of justice. Do the Federal Rules of Civil Procedure mean exactly what they say in all circuits or are they discretionary? Specifically, does F.R.C.P. 12 (g) restrict a defendant to one single pre-pleading motion or

does the presiding judge in the trial court have a discretion beyond the rule to allow other motions? The cases listed in Appendix F indicate a wide but conflicting range of applications of the rule.

We urge the Court to grant this Petition for Certiorari.

I am appearing pro se, but I am a member of the Bar of the Supreme Court of the United States of America.

Respectfully submitted,



Moreton Rolleston, Jr.

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(404) 658-1228

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 85-5494, 85-5733

MORETON ROLLESTON, JR.

v.

ROSE HALL (DEVELOPMENTS) LIMITED,
JOHN ROLLINS, MRS. MICHELLE ROLLINS,
ROSE HALL LIMITED and ROLLINS JAMAICA LIMITED

On Appeal from the United States District Court
for the District of Delaware
(D.C. Civil No. 84-0047)
District Judge: Joseph J. Longobardi

Argued February 21, 1986

Before: WEIS, and SOLVITER Circuit Judges
and ZIEGLER, District Judge*

JUDGMENT ORDER

After consideration of the contentions raised by appellant, it is

ADJUDGED and ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against the appellant.

By the Court,

/s/ Delores K. Sloviter
Circuit Judge

Attest:

/s/ Sally Mrvos
Sally Mrvos, Clerk

Dated: February 26, 1986

*Hon. Donald E. Ziegler, United States District Court for the Western District of Pennyslvania, sitting by designation.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

Civil Action No. 84-47 LON

MORETON ROLLESTON, JR.,
Plaintiff,

Vs.

ROSE HALL (DEVELOPMENTS) LIMITED, et al,
Defendants.

Moreton Rolleston, Jr., Esquire, Atlanta, Georgia, Pro Se Plaintiff.

Paul P. Welsh, Esquire (argued), and Peter W. Leberee, Esquire, of Morris, Nichols, Arsht & Tunnell, Wilmington, Delaware, attorneys for Defendants.

MEMORANDUM OPINION

June 24, 1985
Wilmington, Delaware

LONGOBARDI, District Judge

In 1973, Plaintiff Moreton Rolleston, Jr. ("Rolleston") contracted to purchase five condominium units located in Montego Bay, Jamaica. Plaintiff brought this action for breach of those contracts of sale. Defendants are Rose Hall (Developments) Limited, ("the Developer"), a Jamaican corporation, Rose Hall Limtied ("Rose Hall"), a Cayman Islands corporation, Rollins Jamaica Limited ("Rrollins Jamaica"), a Delaware corporation, and John and Michelle Rollins, who are husbnad and wife and residents of the State of Delaware. Currently before the Court are motions to dismiss filed by each of the Defendants.

BACKGROUND

On or about 1973, Rose Hall owned a tract of land containing 16.7 acres. Developer was incorporated to construct, promote and sell a condominium project to be known as The Palms. In accordance with Jamaican law, Rose Hall

conveyed 11,315.9 square feet of its 16.7 acres to Developer and registered the same under the Registration Act of 1968 as Strata Plan No. 50. Thereafter, another corporation, The Proprietors, Strata Plan No. 50 ("The Proprietors"), was created to administer the operation of the condominiums and to maintain the common areas and to levy assessments from owners of the condominium units. Affidavit of Eugene W. Weaver ("Weaver Affidavit"), Docket Item ("D.I.") 9, ¶ 14.

On March 17, 1973, Plaintiff entered into a contract with the Developer to purchase four condominium units in The Palms. Complaint, D.I. 1, ¶10. On August 17, 1973, Plaintiff agreed to purchase a fifth unit and on September 15, 1973, the Developer wrote to Plaintiff and enclosed a signed agreement to sell the fifth unit to Plaintiff. Id., ¶13.

Plaintiff claims that Defendants have breached several provisions of these sales contracts. His complaint consists of five counts. The first count alleges that the Developer promised to build a restaurant adjacent to the condominiums but has failed to do so despite repeated demand by Plaintiff. Plaintiff seeks to recover for the projected construction price of the restaurant and for his lost rentals due to lack of a restaurant.

The second count relates to the balance of the 16.7 acres of the condominium site which are still owned by Rose Hall. This area contains the tennis courts, swimming pool and other facilities for use of the condominium owners. Plaintiff contends that the Developer promised that Plaintiff would have access to these facilities but that the Developer has no power to fulfill these promises as long as Rose Hall retains title to the land . Plaintiff asks the Court to order

Rose Hall and John Rollins to convey title to the condominium site to the Developer.

The third count asks the Court to enjoin a Jamaican lawsuit filed by the Developer and The Proprietors to recover past due assessments allegedly owned by Plaintiff. In the fourth count, Plaintiff seeks recovery of past due assessments which he claims are owed by the Developer and by Mr. and Mrs. Rollins. The fifth court alleges that Michelle Rollins, with the approval of John Rollins, removed certain plants from the condominium grounds in March 1981, and February, 1983. Plaintiff claims an undivided ownership interest in the plants and seeks damages and return of one of the plants.

Instead of filing an answer to Plaintiff's complaint, each of the Defendants has moved to dismiss. Rose Hall and the Developer have moved to dismiss on the grounds that this Court lacks personal jurisdiction over them. Mr. and Mrs.

Rollins contend that Plaintiff's claims against them must be dismissed for failure to join indispensable parties. They also contend that venue is improper in this district and that this action should be dismissed on grounds of forum non conveniens. Rollins Jamaica has joined in the motion to dismiss filed by Mr. and Mrs. Rollins and also asserts that Plaintff's first, second and fourth causes of action are barred by the statute of limitations. All of the other parties have now moved to amend their motions to dismiss to include the statute of limitations defense but, as discussed below, Plaintiff has objected to this amendment. The Court will consider each of the contentions raised by the various Defendants.

PERSONAL JURISDICTION OVER ROSE HALL AND THE DEVELOPER

In a diversity case, the substantive law of

the forum must be examined to determine whether the Court has jurisdiction over the parties to the suit. Delaware's long arm statute extends jursidiction over persons who commit certain enumerated acts.[1] According to the staute, such

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[1] 10 Del.C. §3104 reads in pertinent part as follows:

(c)(1) Transacts any business or performs any character of work or service in the state;

(2) Contracts to supply services or things in this State;

(3) Causes tortious injury in the State by an act or omission in this State;

(4) Causes tortious injury in the State or outside of the State by an act or omission outside the State if he regularly does or solicits business, engages in any other persistent course of conduct in the State or derives substantial revenue from services, or things used or consumed in the State:

(5) Has an interest in, uses or possesses real property in the State; or

(6) Contracts to insure or act as surety for, or on, any person, property, risk, contract, obligation or agreement located, executed or to be performed within the State at the time the contract is made, unless the parties otherwise provide in writing.

acts constitute sufficient presence in the State to provide the basis for personal jurisdiction. Initially, our analysis must start with reference to the statutorily enumerated acts which provide the basis for personal jurisdiction. Then the Court must determine whether the exercise of long-arm jurisdiction offends "traditional conception(s) of fair play and substantial justice" embodied in the Due Process Clause of the fourteenth amendment. Internat. Shoe Co. vs. Washington, 326 U.S. 310 (1945).

In this case, Rose Hall and the Developer have no direct contact at all with Delaware or with any other location in the United States. Rose Hall is incorporated in the Cayman Islands while the Developer is incorporated in Jamaica. Weaver Affidavit, D.I. 9,pp.2-3. Neither corporation maintains an office or bank account in the United States nor is either corporation

authorized to do business anywhere in the United States. Id. Weaver's unopposed and uncontradicted affidavit, D.I. 9, also reveals that the Plaintiff cannot point to any single instance when Rose Hall or the Developer transacted "any business" or performed any character of work or service" in Delaware. 10 Del.C. §3104(c)(1). Similarly, there is no question of fact on whether they contracted to supply "services or things" in this State. 10 Del.C. §3104(c)(2). The record is devoid of any reference to a tortious act in this State, 10 Del.C §3104(c)(3), or for that matter to any act within the parameters of 10 Del.C. §3104(c)(4), (5) or (6). In the absence of such determinative facts, it is clear that the Court has no basis for asserting personal jurisdiction over either or those two Defendants.

Apparently realizing this, Plaintiff has amended his complaint to request a judgment which disregards the separate corporate existence of Rollins Jamaica, Rose Hall and the Developer and imposes liability for their activities on Mr. and Mrs. Rollins.

Plaintiff points to several factors to support his contention that these corporations are merely the alter ego of Mr. and Mrs. Rollins. For instance, John Rollins owns 100% of the stock of Rollins Jamaica which, in turn, owns virtually 100% of the stock of Rose Hall which, in turn, owns virtually 100% of the stock of the Developer.[2] Deposition of Eugene W. Weaver, D.I. 35, pp. 6-7. The board of directors of the three corporations are closely interconnected. The three directors

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[2]Some of the directors in Rose Hall and the Developer own one share each to satisfy legal requirements. Weaver Deposition, D.I. 35, p.7.

of Rollins Jamaica are Mr. and Mrs. Rollins and Eugene W. Weaver. Id. at p.5. The same three individuals are also directors of Rose Hall and the Developer. Rose Hall and the Developer have identical membership on their boards of directors: the three directors of Rollins Jamaica, Ted Weitzel and Hugh Hart. Id. Management of all three corporations is controlled by the same individuals. Rose Hall and the Developer have no officers and are managed directly by their board of directors. Id. at pp. 5-6. Mrs. Rollins is president of Rollins Jamaica, Eugene W.Weaver is financial vice president and treasurer and Ted Weitzel is vice president. Id. at p.6. Plaintiff contends that these facts demonstrate that Mr. and Mrs. Rollins exercise absolute control of Rollins Jamaica, Rose Hall and the Developer.

Before deciding whether to disregard the separate identity of the three corporations, the

Court must determine which jurisdiction's law to apply. In a diversity action, this Court must apply the choice of law rules of the Delaware state courts. Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 496 (1941); Prashker v. Beech Aircraft Corporation, 258 F 2d 602, 605 (3d Cir. 1958); Japan Petroleum Co (Nigeria) Ltd. v. Ashland Oil, 456 F.Supp. 831, 840 n. 17 (D. Del. 1978). Clearly the substantive law of Delaware would apply to determine the liability of Mr. and Mrs. Rollins, who are Delaware residents, for the activities of Rollins Jamaica, which is incorporated and has its principal place of business in Delaware. A potentially more difficult question is the appropriate law to apply to determine the Rollins' liability for the activities of Rose Hall and the Developer.

In Japan Petroleum, the Court considered a similar question involving the liability of a Delaware parent for the activities of a wholly-

owned Nigerian subsidiary. The court concluded that the Delaware state courts would apply Delaware law in that situation. 456 F.Supp. at 840 n. 17. (citing Pauley Petroleum, Inc. v. Continental Oil Co., Del. Ch., 231 A.2d 450, 457 (1967), aff'd, Del Supr., 239 A2d 629 (1968); Beuchner v. Farbenfabriken Bayer Aktiengesell., Del. Supr., 154 A.2d 684 (1959))[3]. This Court will

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[3]The court went on to hold that, as a practical matter, it was unnecessary to decide which law to apply because the case involved general principles of agency which did not vary significantly from jurisdiction to jurisdiction and because the parties had not pointed to any significant difference between agency principle under Nigerian law and those applied by United States Courts. Id. In this case, the parties have cited cases from various jurisdictions and appear to assume that the law would not differ significantly between jurisdictions.

accordingly apply Delaware law to determine this question.

Under Delaware law, a corporation is a separate entity, distinct from its shareholders even if its stock is totally owned by one individual or corporation. Buechner v. Farbenfabriken Bayer Aktiengesell., 154 A.2d at 687. Even total ownership and common central management are not sufficient reasons to disregard a separate corporate identity. Skouras v. Admiralty Enterprises, Inc., Del.Ch., 386 A.2d 674, 681 (1978); Scott-Douglas Corp. v. Greyhound Corp., Del. Super., 304 A.2d 309, 314 (1973). However, the Delaware courts will hold the controlling stockholder liable for the activities of a subsidiary in two situations: (1) to prevent fraud, or (2) if the facts demonstrate that one corporation is the "alter ego" or "instrumentality" or "agent" of the controlling stockholder. Buechner, 154 A.2d at 686-87; Skouras, 386 A.2d at 681;

Japan Petroleum, 456 F.Supp. at 840. Plaintiff has not alleged that the corporate form was used for fraudulent purposes but, instead, has relied on the alter ego theory.

The central issue in determining whether a corporation is the alter ego or agent of its controlling shareholder is whether the shareholder exercises actual, participatory and total control over the activities of the corporation. Japan Petroleum, 456 F.Supp. at 841. The burden of proof is on the Plaintiff to demonstrate the requisite agency relationship. Publicker Industries v. Roman Ceramics, 603 F.2d 1065, 1069 (ed Cir. 1979).

The courts have looked to a wide variety of factual circumstances to determine whether a corporation is sufficiently dominated by its owners that its separate identity should be ignored. Valley Finance, Inc. vs. United States, 629 F.2d 162, 172 (D.C. Cir. 1980), cited by

Plaintiff, provides a good example of the type of facts that will support a finding of an alter ego relationship. In Valley Finance, the Internal Revenue Service seized assets of Pacific Development, Inc. ("Pacific") to satisfy the tax liability of its sole stockholder, Tongsun Park. The District Court, affirmed by the Court of Appeals, held that the assets could be seized because Pacific was merely the alter ego of Park. Pacific was founded in 1968 but apparantly had no board of directors at all until 1974. After 1974, the board of directors met infrequently and exercised no significant influence on corporate affairs. Park used substantial amounts of corporate funds and staff for personal purposes on a regular basis. He also transferred large sums of money between Pacific and his other ventures in order to advance his personal interests thus disregarding Pacific's separate identity. The court concluded that Pacific existed primarily, if not exclusively, to perform staff functions for

Park and that Park had used it as an incorporated pocketbook. Id. at 172.

In this case, by contrast, Plaintiff has shown nothing of significance to indicate an alter ego relationship beyond stock ownership and common directors. Plaintiff has pointed out that John Rollins has had three political figures stay at The Palms as his guests. Deposition of John W. Rollins, D.I. 37, pp. 3-4. Plaintiff contends that these visits were related to Rollins' personal political ambitions rather than corporate business. Plaintiff also points to a trip taken by Rollins to Canada on a jet owned by Budget Jet, Inc., another corporation wholly-owned by Rollins. Assumning the truth of this allegation, it is difficult to imagine its relevance to the issue of piercing the corporate veil of the corporations named in this lawsuit. Plaintifff, however, argues that these incidents support the inference that Rollins Jamaica, Rose Hall and the Developer are the alter ego of Rollins.

At worst, these incidents involve a few isolated examples of use of corporate assets for personal purposes and they involve relatively minor sums of money. As such, they fall far short of demonstrating the actual, participatory and total control required to disregard a separate corporate identiy.

The Plaintiff has the burden of establishing that jurisdiction exists. Lucas v. Gulf & Western Industries, Inc., 666 F2d 800, 805 (3d Cir. 1981); Akzona v. E.I. duPont de Nemours & Co., Civil Action No. 84-10, ___F. Supp___(D.Del. Oct 2, 1984). As discussed above, there is no basis for asserting jurisdiction over Rose Hall or the Developer based on their direct activities and Plaintiff has failed to demonstrate that these corporations are the alter ego of Mr. and Mrs. Rollins. The motions to dismiss by Rose Hall and the Developer will, therefore, be granted. Furthermore, since the Court has ruled that

Rollins Jamaica is not the alter ego of Mr. and Mrs. Rollins and that the Rollinses cannot be held liabel under Count I, Count I is dismissed as to all parties.

Plaintiff's second count asks the Court to order the conveyance of the condominium site from Rose Hall to the Developer. Since neither party is before the Court and because the Court has found that Mr.and Mrs. Rollins are not liable for the acts of the corporations, this count must also be dismissed. Similarly, Plaintiff's third count, which seeks to enjoin the Developer and The Proprietors from prosecuting a Jamaican lawsuit, must be dismissed since neither party is within the Court's jurisdiction.

FAILURE TO JOIN
INDISPENSABLE PARTIES

Plaintiff's fourth count seeks recovery of back assessments allegedly owed by Rollins. Defendants John and Michelle Rollins and Rollins Jamaica have moved to dismiss on the grounds that

Rose Hall, the Developer and The Proprietors are indispensiable parties as defined by Rule 19 of the Federal Rules of Civil Procedure.[4] Rule

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[4]Rule 19 provides as follows:

Joinder of Persons Needed for Just Adjudication

(a) Persons to be Joined if Feasible. A person who is subject to service of process and wholse joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

(b) Determination by Court Whenever Joinder not Feasible. If a person as described in sub-

division (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

19 (a) (1) provides that a person shall be joined as a party in an action if, in his absence, complete relief cannot be granted among those already parties. If a person described in Rule 19 (a) cannot be joined as a party, Rule 19 (b) requires the Court to determine whether the action should proceed or be dismissed. If the Court dismisses the action, this is tantamount to saying that the party who cannot be joined is indispensable.

In determining whether the absent party is indispensable, the Court must consider whether an adequate judgment can be rendered without that party. The Rollinses contend that Plaintiff's complaint alleges that The Proprietors is the party responsible for levying and collecting assessments. Compliant, D.I. 1, Count 3,¶4. Plaintff's complaint, however, does not say that The Propriestors have the exclusive right to recover back assessments. Rollins has provided

no support for his assertion that Plaintiff lacks standing to bring an action to recover assessments. On the basis of the current record, the Court coannot say that The Proprietors are an indispensalbe party with respect to count four. Failure to join an indispensable party is, therefore, not a basis to dismiss count four.[5]

Count five seeks damages from Mrs. Rollins for allegedly removing plants from the condominium grounds. Defendants assert that The Proprietors are an indispensable party with respect to count five but, again, they provide no real support for this contention and, as in the case of Count IV, Plaintiff, as an owner, may very well have sufficient standing to prosecute this claim. The motion to dismiss count five is, therefore, denied.

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[5]As discussed below, count four will be dismissed based on the statute of limitations.

STATUTE OF LIMITATIONS

Defendant Rollins Jamaica moved to dismiss counts one, two and four on the grounds that these counts are barred by the application statute of limitations. D.I. 30. All of the other Defendants have now moved to supplement their motions to dismiss to add the statute of limitations defense with respect to counts one, two and four. D.I. 26, ¶3.

Plaintiff contends that by failing to raise the statute of limitations defense in their original motion to dismiss, these Defendants, other than Rollins Jamaicia, have waived this defense. Plaintiff also contends that counts one, two and four are not barred by the statute of limitations. The Court will first consider the procedural question of whether the statute of limitations defense was waived and then consider the substantive merits of the defense.

Rule 12(g) of the Federal Rules of Civil Procedure[6] provides that a party who moves under Rule 12 but omits a defense or objection then available to him under Rule 12 shall not, thereafter, move on the omitted defense or orbjection except as permitted by Rule 12(h)(2). Rule 12(h)(2) provides that the defenses of failure

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[6]Rule 12(g) provides as follows:

Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any of the motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

to state a claim, failure to join an indispensable party and failure to state a legal defense are not waived even if omitted from a Rule 12 motion.

Rule 12(g) does not specifically refer to affirmative defenses such as the statute of limitations and the authorities are divided on whether an affirmative defense is waived if not raised in a motion to dismiss. Compare, Canadian Overseas Ores Ltd. v. Compania, Etc., 528 F. Supp. 1337, 1344-45 (S.D.N.Y. 1982) (affirmative defense not waived by failure to include in motion to dismiss); Greenwald v. Cunard Steam-Ship Company, 162 F. Supp. 250, 252 (S.D.N.Y. 1958) (same; dictum) with Wagner v. Fawcett Publications, 307 F.2d. 409, 411-12 (7th Cir 1962) (affirmative defense waived by failure to include in motion to dismiss), cert. denied, 372 U.S. 909 (1963): 5 Wright & Miller, Federal Practice and Procedure §1394 at pp. 868-69 (1969) (same). Those authorities who hold that an affirmative defense is waived by failure to include it in a Rule 12 motion draw an analogy to Rule

8(c) which requires that all affirmative defenses be specifically pleaded in an answer or other responsive pleading. The courts have construed Rule 8(c) to mean that an affirmative defense which is omitted from an answer is waived unless an amendment is allowed under Rule 15. Albee Homes, Inc. v. Lutman, 406 F. 2d 11, 13 (3d Cir. 1969); Advocat v. Nexus Industries, Inc.,497 F. Supp. 328, 330-31 (D.Del. 1980). Even if the Court were to adopt the strict standard for waiver urged by Plaintiff, the Court must still decide whether Defendants should be allowed to amend their motion to include the statute of limitations defnese

A similar question arising under Rule 8 (c) was considered by the court in Advocat v. Nexus Industries, Inc., 497 F. Supp. at 330-331. In Advocat, defendants filed an answer without raising a statute of limitations defense. Under Rule 8(c), the defense was waived unless leave to

amend was granted. Two years after filing their answer, defendants moved to amend their answer to include the statute of limitations defense. Citing Foman v. Davis, 371 U.S. 178 (1962), Judge Latchum held that motions to amend the pleadings should be freely granted unless the court finds that there has been undue delay or that the motion was being made in bad faith or that allowing the motion would unduly prejudice the other party. In Advocat, the court held that there was no adequate explanation for the two year delay in asserting the statute of limitations defense. Nonetheless, the court found that the plaintiff had not been prejudiced in any way by the failure to promptly assert the defense since he could not have maintained his action in any other forum anyway. Since there was no showing of prejudice, the court allowed the defendants to amend their answer despite the undue delay in asserting the defense. Other courts have also freely allowed

amendments to avoid waiver of an affirmative defense where no prejudice is shown. E.g., Rivera v. Anaya, 726 F2d 564, 566 (9th Cir 1984); LaPorte vs. R.D. Werner Co., Inc., 561 F.Supp.189, 191 (N.D. Ill. 1983).

Although Advocat dealt with a motion to amend an answer, the commentators agree that a similar liberal standard should be applied to motions to amend a previous motion. 5C. Wright & A. Miller, Federal Practice and Procedure §1389 at pp.847-48 (1969); 2A J. Moore & J. Lucas, Moore's Federal Practice §12.23 at pp. 2453-54 (2d Ed.1984). Thus, amendment should be allowed unless the Court finds that there was undue delay or bad faith or that undue prejudice would result. Here, there is no indication of bad faith by Defendants. Further, the motion to amend was filed only three months after Defendants' original motion to dismiss rather than two years as in Advocat. Finally, and most importantly, Plaintiff has not been prejudiced

in any way by the delay in asserting the statute of limitations defense. The Court accordingly concludes that Defendants' motion to amend their complaint should be granted.

In a diversity action, this Court must apply the Delaware statute of limitations. Natale v. Upjohn Company, 356 F.2d 590 (3d Cir. 1966). Plaintiff's claims all relate to activiities in Jamaica so 10 Del.C. §8121 is applicable. Section 8121 provides that if a cause of action arises outside of Delaware, the court shall apply the shorter of (1) the Delaware statute of limitations; or (2) the statute of limitations of the jurisdiction where the cause of action arose, in this case, Jamaica. The parties have not definitively informed the Court as to the applicable Jamaican statute of limitations but it is clear that under section 8121, the limitations period can be no longer than that prescribed by Delaware law.

Plaintiff's first, second and fourth counts are all claims for breach of contract. Under 10 Del.C §8106, breach of contract actions may not be brought more than three years after the accural of the cause of action. Goldman v. Braunstein's, Inc., Del. Supr. 240 A.2d, 577, 578 (1968).

Plaintiff attempts to avoid the statute of limitations defense by arguing that 10 Del.C §8127 is applicable. Section 8127 provides that no cause of action shall arise from any alleged deficiency in the construction of an improvement to real property more than six years from the purported completion of all work called for by the contract. Plaintiff argues that section 8127 operates to extend the three year statute of limitations provided in section 8106. This contention is negated by the express language of Del.C. §8127 (c) which provides that section 8127 shall not operate to extend any otherwise applicable

statute of limitations. This contention was also expressly rejected by the Delaware Superior Court in Cheswold Volunteer Fire v. Lambertson Const., Del. Super., 462 A.2d 416, 419 (1983) (per Justice Christie of the Delware Supreme Court, sitting by designation). (The uncontroverted facts in the record demonstrate that in either event, that is, whether 10 DelC §8127 or 10 Del.C. §8106 is applied, the Plaintiff would be barred.) Promises from the Developer and their representative indicated that the "guaranteed opening date for the restaurant (was) November 1, 1973." Ted Weitzel, Vice President and General Manager of Developer, letter dated February 26, 1973. The Plaintiff, therefore, was well aware of the purported breach as far back as November 2, 1973. Considering these circumstances and the restrictive language of DelC. §8127, the Court concludes that the applicable statute of limitations is three years and Plaintiff's Counts I and II are, therefore, barred.

Plaintiff's fourth count seeks recovery of past due assessments allegedly owned by John or Michelle Rollins or the Developer. All of these assessments were due by June 30, 1980. Second Affidavit of Eugene W. Weaver, D.I. 27, ¶3. Since that date is more than three years before Plaintiff filed his complaint, this count is also barred by the statute of limitations.

FORUM NON CONVENIENS
AND IMPROPER VENUE

Defendants contend that Plaintiff's claims must also be dismissed on the grounds that venue is improper in Delaware. In support of this contention, they cite Judge Wright's decision in French v. Clinchfield Coal Co., 407 F. Supp.13 (D.Del. 1976), as holding that the venue provisions of 28 U.S.C. §1391 apply only to "transitory" or "non-local" actions. Defendants contend that since Plaintiff's claims involve title to real property, they are "local" and can only be brought in Jamaica, the site of the property.

As Judge Wright noted, the distinction between "transitory" and "local" actions is unclear and many different standards have been suggested. However, Judge Wright did hold that "(i) if an action is not 'in rem' or does not otherwise deal with title to specific real property directly and necessarily, the defendant must show some reason why the usual policy of trying an action in the district in which process is served ought not to be followed." 407 F.Supp. at 16. In this case, Plaintiff's claims are primarily based on contract rights and do not require the Court to decide issues of Jamaican property law. The only one of Plaintiff's claims which arguably falls within the Clinchfield Coal standard is count two which asks the Court to order Rose Hall to transfer title to the condominium site to the Developer. Even in this count, however, Plaintiff does not challenge Rose Hall's title to the land but merely asserts that it is contracturally bound to transfer

title to the Developer. It is unnecessary to resolve this question, however, since count two must be dismissed in any case for failure to join an indispensable party and because it is barred by the statute of limitations.

Defendants also contend that this action must be dismissed on grounds of forum non conveniens. In Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 508 (1947), the court established the factors to be considered by a district court in determining whether to decline jurisdiction on grounds of forum non conveniens:

> An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendant of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practicable problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforceability of a judgment if one is obtained.

The only claim which has not been dismissed is Plaintiff's claim against Mr. and Mrs. Rollins for removing plants from the condominium grounds. Applying the Gulf Oil factors to this count, the most likely witnesses are the Rollinses themselves who are Delaware residents. Other potential witnesses are the current and former owners of the condominium units who are residents of the United States and Canada. None of them is a permanent resident of Jamaica. Further, Plaintiff has informed the Court that the Jamaican courts do not allow deposition testimony and so the cost of obtaining testimony from these witnesses would be much higher in a Jamaican court than in this court. A view of the premises is unlikely to be helpful. Finally, this Court would have no difficulty enforcing a judgment against Mr. and Mrs. Rollins if one is obtained. The Court accordingly finds that forum non conveniens is not applicable.

CONCLUSION

All of the Plaintiff's claims against Defendants Rose Hall and the Developer must be dismissed for lack of personal jurisdiction over these two Defendants. Plaintiff's first and second counts must be dismissed against all Defendants because none of the parties who are within the Court's jurisdiction can be held liable on these counts and because they are barred by the statute of limitations. Plaintiff's third count must be dismissed because none of the parties to the Jamaican lawsuit are within this Court's jurisdiction while his fourth count is barred by the statute of limitations. Since there are no remaining claims against Defendant Rollins Jamaica, it will be dismissed from the case. The only remaining claim in this case is Plaintiff's fifth

count which seeks damages from Defendants John and Michelle Rollins for removal of certain plants from the condominium grounds.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

MORETON ROLLESTON, JR., Plaintiff,	)	Civil Action Number 84-47 LON
vs.	)	
ROSE HALL (DEVELOPMENTS) LIMITED, et al, Defendants.	)	

ORDER

On the prior Order of this Court dated June 24, 1985, it appearing that there is no just reason for delay in entering final judgment on those causes of action dismissed as detailed therein,

IT IS ORDERED that:

1. Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, final judgment be entered;

2. The remaining causes of action of Count V be stayed during the pendency of Plaintiff's current appeal in this matter.

10/17/85 /s/ Joseph J. Longobardi
Joseph J.Longobardi,D.J.

The foregoing Motion is denied

By the Court,

John Gibbons

Judge

Dated: November 20, 1985

ad/cc: MRJr
PPW

APPENDIX D

UNITED STATES COURT OF APPEALS #B-23
FOR THE THIRD CIRCUIT

No. 85-5494 August 16,1985

Moreton Rolleston, Jr., Appellant
Vs.
Rose Hall (Developments) Limited;
John Rollins, Mrs. Michelle Rollins
and Rose Hall Limited
Rollins Jamaica Ltd.
(Del. Civil 84-0047)

Present: GIBBONS, HIGGINBOTHAM, and BECKER,
Circuit Judges

1. Motion by appellees to dismiss appeal for lack of jurisdiction.
2. Appellant's response to appellees' motion to dismiss, with attachment,

in the above-entitled case.

Respectfully,

/s/ Valurie Young
Deputy Clerk 7-3080

Enc.
vy

APPENDIX E

1. Edwards Co., Inc. v. Monogram Industries, Inc., 700 F.2d 994 (5th Cir. 1983)

2. New Jersey case Lyon v. Barrett, 445 A. 2d 1153 (N.J. 1982).

3. Crum v. Krol, 425 N.E.2d 1081(Ill. App. 1981)

4. Scott v. Mego Internationa, Inc.,519 F.Supp. 1118 (D. Minn.1981).

5. Crose v. Volkswagenwerk Aktiengesellschaft, 558 P 2d 764 (Wash. 1977)

6. General Finance Corporation v. Skinner, 426 N.E. 2d 77 (Ind.App.1981)

7. Consolidated Engineering Co., Inc. vs. Southern Steel Co., 88 F.R.D. 233 (E.D.Va.1980)

8. Cannon Mfg. Co. v. Cudahy Packing Co., 267 U.S. 333, 45 S.Ct. 250, 69 L.Ed.634 (1925)

9. International Shoe Co.v. Washington, 326 U.S.310, 66 S. Ct. 154, 90 L.Ed. 95 (1945)

10. State of New Jersey, Department of Environmental Protection v. Ventron Corporation, 463 A. 2d 893 (N.J. 1983)

11. U.S. v. Creel, 711 F. 2d 575 (5th Cir. 1982)

12. Moline Properties, Inc. v. Commissioner of Internal Revenue. 319 U.S. 436, 63 S. Ct. 1132, 87 L. Ed 1499 (1943).

APPENDIX F

Moore's Manual on Federal Practice and Procedure, Chapter 11, Section 11.04(2) reads, in part, as follows:

> "As indicated in §11.03,supra, all defenses must be made in a responsive pleading, if one is required, except that defenses (1) through (7) of subdivision (b) of Rule 12 may be made by motion prior to pleading. Pursuant to subdivision (g) of Rule 12 (discussed in §11.04(1),supra) if a party makes a motion and omits any of the defenses (1) through (7) then available to him, a second pre-pleading motion, raising the omitted defense may not be made. Subdivision (h), set forth above, takes this procedure one step further and provides that if a party moves pursuant to Rule

12 and omits the defense of lack of personal jurisdiction, improper venue, insufficiency of process or insufficiency of service of process he waives the omitted defense and cannot raise it in his answer. Pursuant to Rule 12(h)(1)(b) any such defense that is not raised by motion or in the answer or reply or an amendment thereto permitted as a matter of course under Rule 15(a) is waived."

In support of the above text, Moores' cites the following cases:

Skidmore v.Snytex Laboratories, Inc. (CA5th, 1976) 529 F2d 1244

Hays v. United Fireworks Mfg., Co.(CA9th, 1969) 420 F2d 836

Guardian Title Co. v. Sulmeyer (CA9th 1969) 1417 F2d 1290

Montgomery Ward & Co. v. Bauer (CA6th 1951) 186 F2d 614

Odekirk v. Mauncie Gear Works, Inc.(CA7th 1950) 179 F2d 821

CERTIFICATE OF SERVICE

This is to certify that I have this day served copies of the foregoing "Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit" upon counsel for all parties by placing three copies in the United States Mail, postage prepaid, properly addressed, as follows:

Paul P. Welsh
P.O. Box 1347
Wilmington, Delaware 19890

This 14th day of May, 1986.

Moreton Rolleston, Jr.